Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-163

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES BRIGGINS,

Petitioner,

- against -

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF OF THE NEW YORK STATE PUBLIC EMPLOYEES FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August, 1986

QUESTION PRESENTED

Whether the New York State Public Officers Law §30(1)(e), which provides that a public office becomes "vacant" upon the felony conviction of the office holder, is unconstitutional as applied to petitioner, who has been terminated from his public employment because of a felony conviction, despite the fact that the conviction was reversed on appeal on the ground that the evidence against him established that his conduct did not constitute a crime.

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INTEREST OF *AMICUS CURIAE*

The attorneys for both parties have consented to the filing of this brief by the New York State Public Employees Federation.

The New York State Public Employees Federation (hereafter "PEF") is the certified bargaining agent for the Professional, Scientific and Technical Services Unit of New York State employees. PEF represents approximately 50,000 state employees. The vast majority of these employees are "tenured." That is, they are civil servants who, by the successful completion of a probationary period, have obtained a legal right not to be terminated from public employment except for cause.

Although most of PEF's members are not public "officers," this case still has profound implications for the due process rights of all public employees. The New York State Court of Appeals has ruled that a public officer who has obtained a property interest in his employment may forfeit that interest, based solely on his conviction of a crime, even if the conviction is reversed on substantive grounds. This decision by New York's highest court means that a person may lose a substantial property interest even if an impartial decision maker has found him guilty of nothing. The case thus addresses the means by which a state can deprive any public employee of the property interest he has in his continued employment under the Fourteenth Amendment's Due Process Clause.

In cases such as *Cleveland Board of Education v. Loudermill*, 470 U.S. __, 84 L.Ed.2d 494 (1985), this Court has recognized this to be an important issue and has significantly developed this area of the law. Yet, as evidenced by the two dissents from the decision of the New York State Court of Appeals, there is still much confusion about this issue.

PEF presents this brief as *amicus curiae* in support of the petition for writ of certiorari. PEF's brief examines the judicial precedents concerning the due process rights of public employees and demonstrates the importance of this case. PEF believes its brief will be of assistance to the Court in considering the petition.

SUMMARY OF ARGUMENT

I.

Petitioner had a property interest in his public employment position as a New York State Police Officer. This property interest is protected by the Due Process Clause of the Fourteenth Amendment.

II.

It is well settled that the Constitution, and not state law, determines the procedures which satisfy due process requirements. Therefore, when the State sought to extinguish petitioner's property interest in his employment, petitioner was entitled to due process.

III.

Petitioner was convicted of a felony and lost his position by automatic operation of New York Public Officers Law §30(1)(e). The conviction was subsequently reversed because petitioner was found innocent of any criminal wrongdoing. Petitioner did not, however, regain his position and was not afforded a reinstatement hearing.

This procedure does not comply with due process. Due process requires that any deprivation of life, liberty, or property be preceded by notice and a meaningful opportunity to be heard. Petitioner, however, was not given an opportunity to be heard on the only issue which remained after the reversal of the criminal conviction, which was whether any of petitioner's conduct might possibly justify discharging him from his position.

IV.

In light of these arguments, it is clear that New York Public Officers Law §30(1)(e), as it was applied to petitioner, is unconstitutional. Review by this Court is crucial: States must not be allowed to arbitrarily eliminate due process protection of important property rights. Therefore, the *amicus* respectfully requests that the Court grant the petition for writ of certiorari.

ARGUMENT

I. PETITIONER HAD A PROPERTY INTEREST IN HIS CONTINUED EMPLOYMENT.

In order to establish a case, petitioner must show that the statutory scheme at issue impacts upon a liberty or property interest protected by the Fourteenth Amendment's guarantee of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Whether there is a property interest in public employment is determined solely by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 345 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth, supra*, at 561.

In the present case, it is undisputed that petitioner had a protected property interest in his employment under New York State's Civil Service Law. *Briggins v. McGuire*, 67 N.Y.2d 965, 502 N.Y.S.2d 985 (1986); New York Civil Service Law, §§58, 63, 75.

II. SINCE THE PETITIONER HAD A PROPERTY INTEREST IN HIS EMPLOYMENT, HE WAS ENTITLED TO DUE PROCESS WHEN THE STATE SOUGHT TO EXTINGUISH THAT INTEREST.

It is now well-settled that once a public employee has obtained a property interest in his continued employment, the deprivation of that interest must meet the standards of constitutional due process even if the state law which creates the property interest provides a lesser standard of procedural protection. *Cleveland Board of Education v. Loudermill*, 470 U.S. __, 84 L.Ed.2d 494, 503 (1985); *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 432 (1982).

The view that a litigant could not challenge the constitutionality of a statute under which rights had been simultaneously claimed, but

had to take "the bitter with the sweet," had been professed by the plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974). This view has since been specifically rejected. In *Cleveland Board of Education v. Loudermill, supra*, the Court stated:

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee . . . "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred not by legislative grace, but by constitutional guarantee." Arnett v. Kennedy, supra, at 167, 40 L.Ed.2d 15, 94 S.Ct. 1633 [Id., at 470 U.S. __, 84 L.Ed.2d 503.]

Since the petitioner had acquired a property interest in his employment, the main issue in this case is whether the State complied with due process when it deprived him of that employment.

III. THE OPERATION OF NEW YORK PUBLIC OFFICERS LAW §30(1)(e) AS IT APPLIED TO PETITIONER FAILED TO SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.

New York Public Officers Law §30(1)(e) provides that a public office is automatically vacated upon an officer's conviction of a felony or of a crime involving a violation of his oath of office. It reads:

> §30. Creation of Vacancies
>
> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:
>
> * * *
>
> e. His conviction of a felony or a crime involving a violation of his oath of office . . . .

The statute recognizes no entitlement to reinstatement or to a hearing after the position has been vacated due to a conviction, even upon reversal of that conviction.

In this case, the New York Court of Appeals' interpretation of POL §30(1)(e) has effectively deprived the petitioner of his public employment without due process. When petitioner was convicted of a felony, his position was automatically vacated by operation of law. When petitioner's conviction was subsequently reversed and his indictment dismissed because petitioner was found to be not guilty of any criminal conduct, the court held that the reversal was irrelevant and that petitioner was not entitled to a reinstatement hearing. *Briggins v. McGuire*, 67 N.Y.2d 965, 502 N.Y.S.2d 985 (1986). It found that the denial of a reinstatement hearing did not raise due process questions because the statute had already extinguished the property interest, and thus there was no property interest to be taken. *Id.*, 502 N.Y.S.2d at 986.

The *Briggins* court relied on two cases in which public employees were deprived of their positions by the operation of POL §30(1)(e). The courts in those cases held that the statute, by vacating the employees' positions, had taken away the employees' property interests. Therefore, since state law left them with nothing, the decision not to provide reinstatement hearings deprived them of nothing. *Greene v. McGuire*, 683 F.2d 32 (1982); *Toro v. Malcolm*, 44 N.Y.2d 146, 375 N.E.2d 739, 404 N.Y.S.2d 558 (1978). The *Briggins* court also cited *Bishop v. Wood, supra*, as "the most relevant [Supreme Court] authority." It concluded that it lacked the authority to order the reinstatement of a former officer in petitioner's position. *Briggins v. McGuire, supra*, 502 N.Y.S.2d at 986.

This analysis is incorrect. The court has failed to ask the question which the Constitution requires and which clearly becomes the specific issue in this case: *Did the deprivation of petitioner's property interest through the operation of POL §30(1)(e) satisfy the requirements of the Due Process Clause?* Instead, the court effectively allowed petitioner's property interest to be defined, and extinguished, by the procedures set forth in the statute, without regard to whether those procedures gave the petitioner notice and an opportunity to be heard in a meaningful way. This, of course, is exactly what this Court rejected in *Loudermill*.

This Court has held that "[a]n essential principle of due process is

that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Loudermill, supra,* 470 U.S. at __, 84 L.Ed.2d at 503, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). New York's POL §30(1)(e) as applied in this case fails to meet this standard.

POL §30(1)(e) bases the forfeiture of public office on a felony conviction. In most cases this procedure would satisfy the requirements of due process. A criminal trial provides the accused with both notice and an opportunity to be heard regarding the charges against him. Moreover, since a felony conviction clearly taints the fitness of a police officer, the State is unquestionably justified in terminating the employment of such an officer. Such a result is rational, and the process accorded the accused is certainly adequate to meet any due process test.

In this case, however, petitioner's conviction was reversed and the criminal indictment dismissed. *People v. Briggins*, 50 N.Y.2d 302, 406 N.E.2d 766, 428 N.Y.S.2d (1980). The New York Court of Appeals found petitioner to be innocent of any criminal wrongdoing. "Applying 'the fundamental principle that a person cannot be found criminally liable for conduct which *does not constitute a crime*' (*People v. Briggins*, 50 N.Y.2d 302, 309, 428 N.Y.S.2d 909, 406 N.E.2d 766 [emphasis added]), we reversed the Appellate Division's order affirming Briggins' conviction and dismissed the indictment." *Briggins v. McGuire, supra,* Hancock, J., dissenting, 502 N.Y.S.2d at 986-87.

Once petitioner's conviction was reversed, the result of the statute's operation became irrational. A public officer not convicted of any crime has irrevocably lost his employment because of an earlier, erroneous conviction. The result of the procedural due process accorded to the employee, a criminal trial, has been ignored. The State has relied on the criminal procedure, but has only selected one isolated part of an integrated system. The State has borrowed the result of a hearing which was ultimately ruled by the Court of Appeals to be incorrect.

As noted in the dissent to the denial of a reinstatement hearing,

common sense and fairness dictate that such a result is clearly wrong. *Briggins v. McGuire, supra,* Hancock, J., dissenting, 502 N.Y.S.2d at 987. The reason it is wrong goes back to the basic proposition that due process requires that the procedures which attend any loss of liberty or property be *meaningful.* In this case, it can hardly be said that the procedures accorded the petitioner were meaningful. Those procedures led to his acquittal, but he was nonetheless deprived of his property.

Once the petitioner had been acquitted of any criminal conduct, the *only* remaining issue was whether he was guilty of any wrongdoing which might possibly be grounds for his dismissal. This potential non-criminal wrongdoing, however, was not an issue at the criminal trial. Therefore, there has been no hearing with regard to this issue. Again, due process procedures must be tailored "to insure that [those deprived of property] are given a *meaningful* opportunity to present their case." *Mathews v. Eldridge, supra,* 424 U.S. 319, 349 (emphasis added). The only meaningful hearing in this case would be one addressing the non-criminal conduct: at this point only a reinstatement hearing can provide due process.

The issue then becomes the feasibility and value of a reinstatement hearing. *Mathews v. Eldridge, supra,* sets forth the factors to be considered in striking the appropriate due process balance. They are: (1) the degree of potential deprivation that may be created by a particular decision; (2) the fairness and reliability of the existing pretermination procedures and the probable value, if any, of additional procedural safeguards to prevent mistakes; and (3) the public interest, including the administrative burden and other societal costs of providing a hearing, such as increased cost to the employer, and the governmental interest in preserving scarce fiscal resources. *Mathews v. Eldridge, supra,* 424 U.S. 319, 347-48.

As applied to petitioner, this balancing test clearly tips in favor of a reinstatement hearing, in much the same way as it did in *Cleveland Board of Education v. Loudermill, supra.*

First, the potential deprivation to petitioner (loss of his employment) is of severe proportions. As noted in the *Loudermill* concurrence:

> The substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted. *Id.* at 221, 40 L.Ed.2d 15, 94 S.Ct. 1633. [*Cleveland Board of Education v. Loudermill, supra*, Marshall, J., concurring, 84 L.Ed.2d at 509.]

Second, as demonstrated, the reliability and fairness of the procedure under POL §30(1)(e), as applied to petitioner, is suspect at best. It is certainly rational for the State to use the result of a criminal trial, in which the accused is given stringent procedural protections, to determine a public officer's fitness. It seems fundamental, however, that if the final result of the criminal process is an acquittal, then the law must provide some mechanism to determine whether the loss of a property interest because of the initial conviction is nonetheless appropriate. The probative value of a reinstatement hearing is obvious. As noted, petitioner has not had a hearing on the only possible remaining issue, which is his potential non-criminal wrongdoing.

This result might be different if the State, under POL §30(1)(e), sought only to use undisturbed factual findings made in the initial criminal case, for their collateral estoppel effect, to determine whether there was misconduct egregious enough to warrant petitioner's dismissal from his employment. The result also might be changed if the conviction, like those in *Greene* and *Toro, supra*, had been reversed on procedural or evidentiary grounds, leaving undisturbed the fact that a criminal trial had produced a finding of felonious conduct. In *Briggins*, however, the State has used the mere fact of conviction, despite the subsequent acquittal, to extinguish a valuable property right.

Third, the administrative burden of supplying a reinstatement hearing is slight, and is clearly justified by the competing interests of the petitioner and the public. As found in *Loudermill*, a due process

hearing for a public employee causes neither significant administrative burden nor intolerable delay. *Cleveland Board of Education v. Loudermill, supra*, 470 U.S. __, 84 L.Ed.2d 494, 505. The employer may be slightly inconvenienced, but "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974).

Moreover, the interests of the public tip the balance in favor of a reinstatement hearing. Even if the State could demonstrate a reasonable interest in the operation of POL §30(1)(e) as it applied to petitioner, this would be far outweighed by the public interest in ensuring that a person who has been wrongfully convicted and punished be made whole.[1]

The State stresses two interests to justify the potentially unfair application of POL §30(1)(e). One is that the public has a right to rest assured that its police officers are of high moral integrity. *Greene v. McGuire, supra*, 683 N.Y.S.2d at 34. While this is a worthy objective, petitioner has not been afforded a due process hearing on the issue of his moral integrity. Therefore, there is no basis upon which the State may conclude that petitioner does not have the integrity to continue in his position. Section 30(1)(e) of the Public Officers Law itself recognizes that even those convicted of misdemeanors not related to their office need not automatically forfeit public office. It is surely irrational for the same law to require the forfeiture of office of one accused and acquitted. Thus, POL §30(1)(e), as applied in this case, does not in any way promote the

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[1] The New York Criminal Procedure Law recognizes this concept, and has established a procedure which corrects injustice and remedies defects. When a judgment has been rendered which is against the weight of the evidence and the law, the CPL mandates that a new trial be granted in the interests of justice. *People v. Stein*, 15 A.D.2d 261, 226 N.Y.S.2d 525 (2nd Dept., 1962); *see also*, New York Criminal Procedure Law §470.20.

In addition, the CPL requires that action must be taken which is "necessary and appropriate . . . to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal . . . ." New York CPL. §470.20.

first interest claimed by the State. This was noted by the dissent to this case, which said, "Nor is such a harsh application of the statute necessary to further its purpose . . . Its purpose is equally free from doubt — not to punish the officeholder . . ." but rather to assure that the public can trust such public officeholders. *Briggins v. McGuire, supra*, Hancock, J., dissenting, 502 N.Y.S.2d at 987.

The State also claims that in order for governmental functions to continue, there must be a time when the vacated position can be filled without concern for the possibility that a reversal of the conviction may occur at some later date. *Briggins v. McGuire, supra*, at 986, *citing Toro v. Malcolm, supra*. This argument is equally tenuous.

That administrative procedures can take time to reach proper results has never been an excuse for allowing the innocent to be punished. If the State relies on the criminal procedure, then it should accept the time that procedure takes to reach a final judgment.[2] "The Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois, supra*, 394 U.S. 645, 656; *Cleveland Board of Education v. LaFleur, supra*, 414 U.S. 632, 647. Thus, the balancing test of competing interests clearly demonstrates that factors which favor a reinstatement hearing are of such magnitude that they far outweigh any interests to the contrary.

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[2] In fact, the State already has a procedure which is designed for exactly this type of situation. The regulations to the New York Civil Service Law provide for "contingent permanent" appointments. Such appointments may be used, for example, where an employee leaves his job to run for public office, but plans to return to that position. 4 NYCRR §4.11. The new appointee is given the position "permanently," contingent on the former officeholder not returning.

Alternatively, the State, knowing that petitioner was appealing his conviction, could have suspended him and given notice to the person hired to fill petitioner's position that it was a potentially temporary job.

In the present case, the court expressed sympathy with the "plight of the truly innocent officer unjustly accused and convicted." The court noted, however, that it was simply enforcing legislative intent. *Briggins v. McGuire, supra*, 502 N.Y.S.2d at 986. Additionally, it cited the fact that the Legislature has not seen fit to remedy this unfortunate result. *Id.*

This is a statement which this Court should not endorse. Surely the Due Process Clause, if it means anything, means that the law should not leave persons wrongfully deprived of liberty or property with only an apology. The very reason for due process is to prevent the State from punishing absent a reasoned finding of culpable conduct. *See, Robinson v. California*, 370 U.S. 660 (1962) (State law making it a crime to be a drug addict unconstitutional under Eighth and Fourteenth Amendments); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (State cannot impose criminal punishment absent evidence of guilt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (it is a denial of due process to fine a man $10.00 absent any evidence of his guilt).

Finally, it is irrelevant that the New York Legislature has not corrected an obviously unjust law. As this Court clearly ruled in *Loudermill*, it is the Constitution, not legislative grace, which defines due process. The innocent victim need not take the bitter with the sweet:

> That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they *might fall upon a wrongfully discharged employee is simply unacceptable.* [*Loudermill, supra*, 470 U.S. __, 84 L.Ed.2d 494, 509, Marshall, J., concurring.] [emphasis added]

CONCLUSION

In sum, the State's argument that due process was not implicated when petitioner was denied a reinstatement hearing is misplaced. Because POL §30(1)(e) does not provide for a hearing in the event of a reversal of conviction upon a finding of no criminal conduct, the statute denies due process. It is respectfully submitted that in such a case, a public employee has a constitutional due process right to a reinstatement hearing.

Accordingly, PEF submits that the challenged statute, as applied to petitioner, is unconstitutional.

This case reaches far beyond the issue of one public employee who has been discharged without a hearing. It is a fundamental principle of justice that punishment without a showing of wrongdoing is unfair, needless and unacceptable. When a state violates this principle, it does so in clear disregard of the Due Process Clause.

For this reason, PEF respectfully urges that this Court grant the petition for Writ of Certiorari.

August, 1986

Respectfully submitted,

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